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Sime Hok Sdn Bhd v Soh Poh Sheng

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–14 OF 2012

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RAUS SHARIF PCA, AHMAD MAAROP, ZAINUN ALI, SULONG MATJERAIE AND JEFFREY TAN FCJJ

17 JANUARY 2013

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Contract — Agreement — Agreement for sale — Sale of land — Development of housing estate — Agreements with land proprietors — Whether breach of promise occurred — Whether action filed in time — Contracts Act 1950 s 47

D

Land Law — Subdivision — Sale of land — Development of housing estate — Agreements with land proprietors — Lands subdivided into 115 individual lots — Imposition of condition upon sale of land to settle debt and to remove caveats — Written agreement to transfer land with consideration of sum — Whether sales proceed utilised to settle interest of proprietors — Notices to withdraw caveats not met — Obligation to settle with proprietors — Whether action filed in time — Whether breach of promise occurred — Contracts Act 1950 s 47

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Carima Binaan Sdn Bhd ('Carima') had entered into agreements with the proprietors ('proprietors') of lands known as Lots 3660, 2100 and 2043 ('lands') in 1979 and in 1982, for the purpose of developing them into a housing estate ('joint venture'). Carima failed to carry out the joint venture and sold their interest in the joint venture to MDV Properties Sdn Bhd ('MDV'), which later, also failed to see through the joint venture. Lots 3660 and 2100 had been subdivided into 115 individual lots. MDV, the appellant and the

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respondent orally agreed that MDV would sell the lands to the appellant with the terms that the appellant would settle the outstanding debt owed by MDV to Hock Hua Bank Bhd ('bank') in the sum of RM1.55m and would redeem those lands from the bank. It was also orally agreed that the appellant would secure a transfer of Lot 2043 to the respondent upon terms that the respondent

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would remove caveats lodged by the proprietors of Lots 2100 and 3660 with the application of the proceeds received from the sale of Lot 2043, and would settle the interest of the proprietors in the joint venture. Subsequently, the appellant paid RM1.55m and took custody and possession of the documents of title to the said 115 subdivided lots and to Lot 2043. MDV and the respondent

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then entered into a written agreement to transfer Lot 2043 to the respondent, with the consideration of RM900,000. In the High Court, the learned judge held that the RM900,000 was not paid by the respondent but was only stated as the consideration to enable the respondent to sell Lot 2043 to a third party in order to utilise the sale proceeds to settle the interest of the proprietors.

Although the respondent settled with the proprietors of Lots 2100 and 2043, proprietors of Lot 3660 allegedly rejected all offers of settlement and refused to withdraw their caveats lodged against eight of the subdivided lots. Hence, only 107 subdivided lots were transferred to the appellant and when the appellant sold all 115 subdivided lots to Sime Hok Sdn Bhd, only 107 subdivided lots were transferred to the latter. The appellant gave ten days to the respondent to withdraw the caveats. The appellant gave another month's notice to the respondent resolve the issue. When those notices were not met, the appellant filed action against the respondent for RM900,000 or damages. The High Court held that it was the obligation of the respondent to settle with the proprietors of Lot 3660. The High Court held that the action was filed out of time. It was further held that breach occurred when there was no prior notice by the appellant to the respondent to remove the caveats. In the present appeal, the issue that arose was whether a breach of the promise occurred, without any notice to perform, after the expiry of a reasonable time pursuant to s 47 of the Contracts Act 1950 ('the Act').

Held, dismissing the appeal with costs:

(1) A notice fixing time for performance depends on the peculiar facts, to make time of the essence to justify rescission of the contract to preclude the intervention of equity or, in other words, the effect of s 56(2) of the Act. The practical necessity for such a rule is that the notice operates as evidence of the date by which the promisee considers it reasonable to require the contract to be performed, failure to perform by which is evidence of an intention not to perform (see para 26).

(2) Equity would not allow the contract to be so treated unless the party in default had been given an opportunity to mend his ways. The only way in which that can be done was by giving him notice to comply within a reasonable time. Such a notice was invariably described as one making time of the essence of the contract, although it had been justly observed that the description was not quite accurate. That is because one party cannot vary the terms of the contract on his own. The notice was given in order to bring to an end, by equitable means, equity's interference with the legal rights of the parties (see para 26).

(3) The respondent promised by contract to settle the interest of the proprietors of lot 3660, the performance of which depended entirely on him alone, and the contract was silent as to the time for performance. The law provided that the respondent must perform that promise within a reasonable time. As said, the question for consideration posits the expiry of a reasonable time for performance. Strictly speaking, there was no need to consider the reasonable time for performance (see para 30).

(4) Having regard to the state of things, and to the circumstances of the case and nature and circumstances of the performance, it should be conveyed

to any reasonable person in the shoes of the appellant that either the respondent could not perform the promise, which was default, or had taken such lengths to perform the promise as to amount to repudiation or disavowal either of the oral agreement in relation to Lot 3660 as a whole or of a fundamental obligation under it. The court agreed with the finding of the High Court and as affirmed by the Court of Appeal that a reasonable time for performance ended and the action was filed out of time (see para 37).

[Bahasa Malaysia summary

Carima Binaan Sdn Bhd ('Carima') telah memeterai perjanjian dengan pemilik-pemilik ('pemilik-pemilik') tanah yang dikenali sebagai Lot 3660, 2100 dan 2043 ('tanah-tanah') pada tahun 1979 dan 1982 untuk tujuan membangunkan tanah-tanah tersebut kepada estet perumahan ('perniagaan usaha sama'). Carima gagal untuk melaksanakan perniagaan usaha sama dan telah menjual kepentingannya dalam perniagaan usaha sama kepada MDV Properties Sdn Bhd ('MDV'), yang mana kemudiannya, juga gagal untuk meneruskan perniagaan usaha sama tersebut. Lot 3660 dan 2100 telah dipecah bahagikan kepada 115 lot-lot individu. MDV, perayu dan responden secara lisan telah bersetuju bagi MDV untuk menjual tanah-tanah kepada perayu dengan syarat-syarat bahawa perayu akan menjelaskan hutang tertunggak terhutang oleh MDV kepada Hock Hua Bank Bhd ('bank') dengan jumlah RM1.55 juta dan akan menebus semula tanah-tanah tersebut daripada bank. Adalah juga dipersetujui secara lisan bahawa perayu akan menjamin pindah milik bagi Lot 2043 kepada responden, dengan terma bahawa responden akan menarik balik kaveat yang dimasukkan oleh pemilik-pemilik Lot 2100 dan 3660 dengan menggunakan hasil yang diterima daripada jualan Lot 2043, dan akan menyelesaikan kepentingan pemilik-pemilik dalam perniagaan usaha sama. Selanjutnya, perayu telah membayar RM1.55 juta dan mengambil jagaan dan milikan dokumen hak milik 115 lot yang dipecah bahagikan dan Lot 2043. MDV dan responden kemudian telah memeterai perjanjian untuk memindah milik Lot 2043 kepada responden dengan pertimbangan sebanyak RM900,000. Di Mahkamah Tinggi, hakim yang bijaksana memutuskan RM900,000 tidak perlu dibayar oleh responden tetapi hanyalah dinyatakan sebagai pertimbangan bagi membolehkan responden untuk menjual Lot 2043 kepada pihak ketiga supaya hasil jualan dapat digunakan untuk menyelesaikan kepentingan pemilik-pemilik. Meskipun responden telah menyelesaikan urusan dengan pemilik-pemilik Lot 2100 dan 2043, pemilik-pemilik Lot 3660 didakwa telah menolak segala tawaran untuk penyelesaian dan enggan menarik balik kaveat-kaveat mereka yang dimasukkan terhadap kelapan-lapan lot yang telah dipecah bahagikan. Justeru, hanya 107 lot yang dipecah bahagikan telah dipindah milik kepada perayu dan apabila perayu menjual kesemua 115 lot yang dipecah bahagikan kepada Sime Hok Sdn Bhd, hanya 107 lot yang dipecah bahagikan telah dipindahmilik kepada Sime Hup Sdn Bhd. Perayu memberikan 10 hari kepada responden untuk menarik balik kaveat-kaveat

tersebut. Perayu telah memberikan satu bulan notis kepada responden untuk menyelesaikan isu-isu tersebut. Apabila notis-notis tersebut tidak ditepati, perayu telah memfailkan tindakan terhadap responden untuk RM900,000 atau ganti rugi. Mahkamah Tinggi memutuskan bahawa tindakan telah difailkan melebihi had masa. Selanjutnya, adalah diputuskan bahawa percanggahan berlaku apabila tidak terdapat sebarang notis awal oleh perayu kepada responden untuk menarikbalik kaveat-kaveat. Dalam rayuan ini, isu yang timbul adalah sama ada percanggahan perjanjian telah berlaku, tanpa apa-apa notis untuk melaksanakan, selepas tamat tempoh masa yang berpatutan mengikut s 47 Akta Kontrak 1950 ('Akta tersebut').

Diputuskan, menolak rayuan dengan kos:

(1) Notis yang menyatakan tempoh untuk pelaksanaan bergantung kepada fakta-fakta yang luar biasa, untuk menjadikan masa sebagai asas untuk menjustifikasikan pembatalan kontrak untuk mengecualikan campur tangan ekuiti atau, dengan kata lain, kesan s 56(2) Akta. Keperluan praktikal untuk peraturan sebegini adalah notis tersebut berperanan sebagai keterangan tarikh yang mana orang yang menerima jaminan menganggap adalah berpatutan untuk memerlukan kontrak tersebut untuk dilaksanakan, di mana jika gagal dilaksanakan adalah keterangan tentang niat untuk tidak melaksanakan (lihat perenggan 26).

(2) Ekuiti tidak membenarkan kontrak untuk dijadikan sedemikian melainkan pihak yang gagal telah diberikan peluang untuk memperbetulkan keadaan. Hanya satu cara ia boleh dilakukan ialah dengan memberikannya notis untuk mematuhi dalam jangka masa yang berpatutan. Notis tersebut dengan tetap merupakan suatu yang menjadikan masa sebagai asas kontrak, meskipun dengan adilnya diperhatikan bahawa butiran adalah tidak tepat. Ini adalah kerana satu pihak tidak boleh mengubah terma kontraknya dengan sendirinya. Notis telah diberikan untuk menamatkan, dengan cara ekuiti, apa-apa campur tangan ekuiti dengan hak-hak sah pihak-pihak (lihat perenggan 26).

(3) Responden melalui kontrak telah berjanji untuk menyelesaikan kepentingan pemilik-pemilik Lot 3660, pelaksanaan yang mana bergantung kepadanya secara keseluruhan, dan kontrak tidak menyatakan tentang jangka masa pelaksanaan. Undang-undang memperuntukkan bahawa responden perlu melaksanakan perjanjian tersebut dalam jangka masa yang berpatutan. Seperti yang dinyatakan, persoalan untuk ditentukan adalah tarikh tamat masa berpatutan suatu pelaksanaan. Secara tegas, adalah tidak perlu untuk mempertimbangkan jangka masa berpatutan untuk pelaksanaan (lihat perenggan 30).

(4) Mengambil kira keadaan hal, dan keadaan kes dan sifat dan keadaan pelaksanaan, ia patut disampaikan kepada mana-mana orang yang munasabah yang berada dalam tempat perayu bahawa sama ada

responden tidak dapat melaksanakan perjanjian, yang mana merupakan kegagalan, atau telah mengambil langkah-langkah untuk melaksanakan perjanjian yang mana membawa kepada pembatalan atau penafian sama ada terhadap perjanjian lisan berkenaan dengan Lot 3660 secara keseluruhan atau kewajipan utama di bawahnya. Mahkamah bersetuju dengan dapatan Mahkamah Tinggi dan seperti yang disahkan oleh Mahkamah Rayuan bahawa jangka masa munasabah untuk pelaksanaan telah tamat dan tindakan telah difailkan menjangkaui had masa (lihat perenggan 37).]

Notes

For a case on agreement for sale, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 2800.

For cases on sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 5198–5199.

Cases referred to

Astea (UK) Ltd v Time Group Ltd [2003] EWHC 725, QBD (refd)

Behzadi v Shaftesbury Hotels [1992] Ch 1, CA (refd)

Carr v JA Berriman Pty Ltd (1953) 89 CLR 327 (refd)

Dalkia Utilities Services plc v Celtech International Ltd [2006] All ER (D) 203, QBD (refd)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464, FC (refd)

Ellis v Thompson and Kebbel (1838) 3 M&W 445 (refd)

Farrant v Olver (1922) WN 47, Ch D (refd)

Forslind v Bechely-Crundall [1922] SC 173, HL (refd)

Ganam Rajamany v Somoo Siniah [1984] 1 CD 123 (refd)

Hick v Raymond and Reid [1893] AC 22, HL (refd)

Hind Construction Contractors v State of Maharashtra AIR 1979 SC 720, SC (refd)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65, CA (refd)

Laurinda Pty Limited & Ors v Capalara Park Shopping Ptv Limited (1989) 166 CLR 623, HC (refd)

National Car Parks Ltd v Baird (Valuation Officer) and another [2004] EWCA Civ 967, CA (refd)

Osborne v Australian Mutual Growth Fund [1972] 1 NSWLR 100 (refd)

Penang Development Corporation v Khaw Chin Boo & Anor [1993] 2 MLJ 161, HC (refd)

Raineri v Miles [1981] AC 1050, HL (refd)

Raineri v Miles and another (Wiejski and another, third parties) [1979] 3 All ER 763, CA (refd)

Shevill v Builders Licensing Board (1982) 149 CLR 620; 42 ALR 305, HC (refd)

Stone and Saville's Contract, Re [1963] 1 All ER 353; [1963] 1 WLR 163, CA (refd)
Tan Hock Chan v Kho Teck Seng [1980] 1 MLJ 308, FC (refd)
United Scientific Holdings Ltd v Burnley Borough Council [1976] 1 EGLR 89; [1978] AC 904, CA (refd)

Legislation referred to

Contracts Act 1950 ss 47, 56, 56(1), (2)
Housing Developers (Control and Licencing) Regulations 1982
Indian Contract Act 1872 [IND] s 46

Foo Joon Liang (Sebastian Cha and Ang Kok Chun with him) (Sebastian Cha & Co) for the appellant.
Wong Kim Fatt (Wong Boon Lee and Wong Boon Chong with him) (Gulam & Wong) for the respondent.

Jeffrey Tan FCJ (delivering judgment of the court):

[1] Leave was granted to appeal against the order of the Court of Appeal in respect of the matter decided by the High Court in the exercise of its original jurisdiction, on the following question:

> Where an agreement is silent as to the time for performance of a promise thereunder, whether a breach of the promise occurs, without any notice, after the expiry of a reasonable time pursuant to s 47 of the Contracts Act 1950 (Act).

[2] The pertinent facts could be summarised as follows. In 1979 and in 1982, one Carima Binaan Sdn Bhd ('Carima') had entered into agreements with the proprietors ('proprietors') of Lots 3660, 2100 and 2043 ('lands') in the Mukim of Pontian, Johor to develop those lands into a housing estate (joint venture). Carima failed to carry out the joint venture. Rather, instead, in 1989, Carima sold their interest in the joint venture to one MDV Properties Sdn Bhd ('MDV'). Lots 3660 and 2100 by then had been subdivided into 115 individual lots. But MDV also failed to see through the joint venture. It was then orally agreed between MDV, the appellant and the respondent that MDV would sell those lands to the appellant upon terms that the appellant would settle the outstanding debt (RM1.55m) owed by MDV to the Hock Hua Bank Bhd ('bank') and would redeem those lands from the bank. It was also orally agreed that the appellant would secure a transfer of Lot 2043 to the respondent upon terms that the respondent would obtain the removal of the caveats lodged by the proprietors of Lots 2100 and 3660 with the application of the proceeds received from the sale of Lot 2043, and would settle the interest of the proprietors in the joint venture. Pursuant to that oral agreement, the appellant paid the full redemption sum (RM1.55m) and took custody and possession of the documents of title to the said 115 subdivided lots and to Lot 2043.

[3] Later, by written agreement dated 16 February 1993 between MDV and the respondent, it was agreed that Lot 2043 would be transferred to the respondent, with RM900,000 as the consideration. It was the finding of the High Court that that RM900,000 was not paid by the respondent to MDV but was only so stated as the consideration to enable the respondent to sell Lot 2043 at that price to a third party and then to utilise the sale proceeds to settle the interest of the proprietors. As it happened, the respondent managed to settle with the proprietors of Lots 2100 and 2043 on 12 April 1993 but failed to reach accord with the proprietors of Lot 3660 who allegedly rejected all offers of settlement and refused to withdraw their caveats lodged against eight of the subdivided lots, which happened to be their beneficial entitlement under the joint venture. Given the presence of those caveats, only 107 of the subdivided lots could be transferred to the appellant. And so in a later dealing, when the appellant sold all 115 subdivided lots to one Sime Hup Sdn Bhd on 11 December 1993, only 107 subdivided lots were transferred to Sime Hup Sdn Bhd.

[4] There was no dispute that contrary to the oral agreement, the respondent could not obtain the proprietors of Lot 3660 to withdraw their caveats. In a word, the appellant, who had purchased Lots 3660 and 2100 and so was entitled to all 115 subdivided lots, was short-changed, so to speak, by eight subdivided lots. The appellant did not accept that lying down. By letter dated 1 May 1997, the appellant gave ten days to the respondent 'to cause the withdrawal of the caveats'. Then, by a second and final letter dated 28 May 2002, the appellant gave a month to the respondent 'to settle with the caveators … and to show proof … that the caveats had been withdrawn …'. When those notices were not met, the appellant filed action against the respondent on 20 September 2002 for RM900,000 or damages. Those caveats were yet lodged against those eight subdivided lots when the action was tried.

[5] It was the finding of the High Court that it was the obligation of the respondent to settle with the proprietors of Lot 3660. In that it was not performed by the end of 1994, by which date it was held by the High Court that a reasonable time for performance had expired and to which the Court of Appeal agreed, the High Court held that the cause of action accrued on 31 December 1994 and that the action, which was filed on 20 September 2002, was therefore filed out of time (see p 46 of the appeal record). The appellant first issued notice to the respondent to perform the oral agreement on 1 May 1997. Hitherto, there was no notice by the appellant to the respondent to perform the oral agreement. But the High Court nonetheless held that breach occurred in 1994 when there was no prior notice by the appellant to the respondent 'to cause the withdrawal of the caveats'. Given so, it would appear that in relation to the question for our consideration — 'whether a breach of the promise occurs, without any notice (to perform), after the expiry of a

reasonable time pursuant to s 47 of the Contracts Act 1950' — it had been answered, albeit indirectly, by the High Court in the affirmative. Would we give the same answer? A

[6] There should be no issue that it was the obligation of the respondent to settle with the proprietors of Lot 3660. The issue however is whether there could be breach of the oral agreement, when there was no prior notice by the appellant to the respondent to perform, after the expiry of a reasonable time for performance. If breach so occurred, then the further issue is when did breach occur, for the computation of the limitation period for filing of actions which was raised as a defence. The issue is not whether the time stated in the appellant's notices for performance, be it within ten days or within a month, was reasonable. In truth, the issue is not even whether a reasonable time for performance had expired, for the question posed for our consideration, upon the terms in which it is couched, posits the expiry of a reasonable time for performance. B C D

[7] The oral agreement did not specify when the respondent must settle with the proprietors of Lot 3660. 'Where a party undertakes by contract to do an act, the performance of which depends entirely on himself, and the contract is silent as to the time of performance, the law will imply a term that the act should be performed within a reasonable time: see *Chitty on Contracts* (29th Ed), para 21–020. Such a term will be implied because it represents the unexpressed intention of the parties or is necessary to give business efficacy to the contract '(*National Car Parks Ltd v Baird (Valuation Officer) and another* [2004] EWCA Civ 967 per Sir Andrew Morritt VC). That common law principle finds codification in s 47 of the Act, which reads: E F

> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time. G
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> Explanation — The question 'what is a reasonable time' is, in each particular case, a question of fact.

[8] In *Penang Development Corporation v Khaw Chin Boo & Anor* [1993] 2 MLJ 161, Mohamed Dzaiddin J (as he then was) explained: H

> So when no time is specified, the contract must be performed within a reasonable time — s 47 of the Contracts Act 1950. What is 'a reasonable time' is, in each particular case, a question of fact (ibid). However, the plaintiffs cannot arbitrarily fix the time. It must be reasonable having regard to the state of things at the time when notice was given. I

[9] The facts in *Penang Development Corporation* were as follows. The

plaintiffs claimed damages for late delivery of a flat which they had purchased from the defendant. The pertinent sale and purchase agreement was silent on the date of delivery. Possession was given more than three and a half years after execution of the agreement. The plaintiffs relied on the 24 months' period under the Housing Developers (Control and Licensing) Regulations 1982 ('the Regulations'). The defendant pleaded that the claim disclosed no cause of action. The magistrate found for the plaintiff. The defendant appealed to the High Court. The issue was whether the claim disclosed a reasonable cause of action. But what was said by Mohamed Dzaiddin J (as he then was) also concerned the absence of a notice by the plaintiff to the promisor to perform:

> Secondly and more importantly, the amended statement of claim has failed to plead that the plaintiffs have given notice to the defendant to complete the delivery of vacant possession within a reasonable time. What had been pleaded was merely an allegation that the defendant had failed to deliver vacant possession within reasonable time (para 5). In my opinion, a written notice giving time to complete the delivery is necessary since time by which the contract was to be completed has not been stipulated, nor made the essence of the contract. According to *9 Halsbury's Laws of England* (4th Ed), para 485:
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> > In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given, and to all the circumstances of the case.
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> In *Green v Sevin 3*, Fry J stated at p 599:
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> > One of the earliest cases on this doctrine of engrafting time by notice is *Taylor v Brown* 2 Beav 180, and there Lord Langdale, the then Master of the Rolls, expressed his view in this way: 'Where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract — in such case, if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other'. So in *King v Wilson* 6 Beav 124, the same Master of the Rolls laid down the principle in these words: 'Though time may not be of the essence of a contract, yet where there is great and improper delay on one side, the other party has a right to fix a reasonable time within which the contract is to be completed'. So again, in *Pegg v Wisden* 16 Beav 239, Sir John Romilly said: 'I concur also in the decisions, that where time is not originally of the essence of the contract, it may, in the case of improper delay, be made so by notice'.

[10] In gist, in *Penang Development Corporation* it was held that to make time of the essence of the contract, a notice giving reasonable time for performance is necessary. In *Penang Development Corporation*, where the contract was silent

on the date of delivery and s 47 was therefore the applicable provision, the court had relied on para 485 of the *Halsbury's Laws England*, which was a commentary on what would be the common law principles as codified in s 56 of the Act, which concerns the effect of failure to perform at the agreed time, in a contract in which it was the intention of the parties that time should be of the essence of the contract or in a contract in which it was not the intention of the parties that time should be of the essence of the contract. Be that as it may, we discern that it was not held in *Penang Development Corporation* that a notice fixing time for performance is *de rigueur* before breach of a promise in which time for performance is not specified could crystallise.

[11] In *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65, the plaintiff sued the defendant for payment under an agreement for the construction of an office and a factory which provided for completion on 30 November 1980. Work was only completed on 24 September 1981. The defendant averred that the plaintiff was not entitled to the amount claimed by reason of its failure to complete construction within time. The defendant counterclaimed for liquidated damages and the loss of interest on project investment and the loss of income from investment by reason of the plaintiff's delay. The plaintiff pleaded that even though time was of the essence of the contract, the defendant had allowed the completion dates to pass and acquiesced to the works continuing under the agreement. The trial judge gave judgment for the plaintiff but also allowed part of the defendant's counterclaim.

[12] On appeal, the Court of Appeal (NH Chan, Abdul Malek Ahmad and Mokhtar JJCA) held that since the defendant did not rescind the contract when the plaintiff failed to complete and even allowed the plaintiff to remedy his default by permitting him to continue to work on the project until it was wholly completed, time was no longer to be regarded as of the essence of the contract.

[13] The contract in *Hock Huat Iron Foundry* specified a time for performance by the plaintiff. However, it was held that time was no longer of the essence of the contract, and that time was therefore at large. In that state of things, NH Chan JCA enunciated that s 47 of the Contracts Act 1950 came into play:

> When time is no longer of the essence of the contract and no time for performance is specified, the promise must be performed within a reasonable time. Section 47 reads …
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> As to what is a reasonable time to have the contract performed is, in each particular case, a question of fact. But where one party has been guilty of unnecessary delay, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end. The remedy at law for one party to call off the

contract unilaterally in this way if he finds the other guilty of unnecessary delay has survived unscathed to the present day because equity would not assist the party who had been guilty of impropriety (see *Jamshed Khodaram Irani v Burjori Dhunjibhai* (1915) 32 TLR 156 at p 157). In *Webb v Hughes*, Malins VC said at p 286:

> But if time be made the essence of the contract, that may be waived by the conduct of the purchaser; and if the time is once allowed to pass, and the parties go on negotiating for completion of the purchase, then time is no longer of the essence of the contract. But, on the other hand, it must be borne in mind that a purchaser is not bound to wait an indefinite time; and if he finds, while the negotiations are going on, that a long time will elapse before the contract can be completed, he may in a reasonable manner give notice to the vendor, and fix a period at which the business is to be terminated. But, having once gone on negotiating beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown.

See also Pollock & Mulla, *Indian Contract and Specific Relief Acts* (11th Ed, 1994), Vol 1 at p 585:

> Either party's general right to have the contract performed within a reasonable time according to the circumstances is, of course, unaffected by the fact of time not being the essence; and in case of unnecessary delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the contract as at an end (*Stickney v Keeble & Anor* [1915] AC 386).

In *Stickney v Keeble & Anor* [1915] AC 386, the headnote reads:

> Where in a contract for the sale of land the time fixed for completion is not made of the essence of the contract, but the vendor has been guilty of unnecessary delay, the purchaser may serve upon the vendor a notice limiting a time at the expiration of which he will treat the contract as at an end, …

Where no time for performance is specified, s 47 of the Contracts Act 1950 allows the promise to be performed within a reasonable time. But if there has been unnecessary delay by one party, the other may give him a notice fixing a reasonable time at the expiration of which he will treat the contract as at an end. Here, in the present case, the defendant did not give notice of its intention to give up the contract if the plaintiff still fails to complete at the time specified in the notice.

…

Ending the contract after the expiration of the notice giving the defaulting party a reasonable time to perform his part of the bargain (where no time for performance is specified as in s 47) would entitle the party who gave the notice to be relieved of the contract and to sue for breach of contract for non-performance and to claim damages under s 74, whereas avoiding the contract where the intention of the parties is that time is of the essence of the contract (under s 56(1)) would only entitle the party not at fault to claim restitution under ss 65–66.

In this country, s 56(1) requires a consensus of the parties to the contract to make time the essence of the contract. The subsection uses the words 'if the intention of the parties was that time should be of the essence of the contract'. Therefore, it is

plain that in cases where s 56(1) applies, one party cannot unilaterally make time the essence of the contract. If time be not of the essence of the contract, one party could not of his own volition make it so unless there had been such improper conduct on the part of the other party (such as unnecessary delay where no time for performance is specified as in s 47) as to justify ending the contract if a notice fixing a reasonable time be not complied with. See Harman J in *Smith v Hamilton* [1951] Ch 174 at p 181:

> If time be not of the essence of the contract initially, it follows, in my judgment, that one party cannot, of his own motion, make it so; to say that by writing a letter one party can make time of the essence when it was not so before, may be a convenient but is an inaccurate way of putting it. That has been pointed out on many occasions, and amongst others by Fry J in *Green v Sevin* (1879) 13 Ch D 589 at p 599. Fry J said:
>
> > What right then had one party to limit a particular time within which an act was to be done by the other? It appears to me that he had no right so to do, unless there had been such delay on the part of the other contracting party as to render it fair that, if steps were not immediately taken to complete, the person giving the notice should be relieved from his contract. It has been argued that there is a right in either party to a contract by notice so to engraft time as to make it of the essence of the contract where it has not originally been of the essence, independently of delay on the part of him to whom the notice is given. In my view there is no such right. It is plain upon principle, as it appears to me, that there can be no such right. That which is not of the essence of the original contract is not to be made so by the volition of one of the parties, unless the other has done something which gives a right to the other to make it so. You cannot make a new contract at the will of one of the contracting parties. There must have been such improper conduct on the part of the other as to justify the rescission of the contract sub modo, that is, if a reasonable notice be not complied with. That this is the law appears to me abundantly plain.
>
> Since, then, time not being of the essence, the vendor could not, of his own volition, make it so unless there had been some impropriety on the part of the purchaser.

[14] The long and short of it, as held and observed in *Hock Huat Iron Foundry*, is that where a party not in default does not rescind a contract under s 56(1) of the Contracts Act 1950 but allows the party in default to complete the work beyond the completion date, then time is no longer of the essence of the contract, and that when time is at large, the promisor must perform the promise within a reasonable time as provided under s 47 of the Act, and if there is unreasonable delay the party not in default may give a notice fixing a reasonable time for performance after the expiration of which the party not in default would treat the contract as at an end (rephrased from *Law of Contract in Malaysia* by A Mohaimin Ayus at p 20). Again it was not held, only that time by the Court of Appeal, that a notice fixing a reasonable time for performance

is required before breach of a promise in which time for performance is not specified could crystallise. Indeed, we were not shown any authority that ruled that such notice is essential before breach could occur. Rather, to the contrary, there is a decision of this court, namely *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464, that could not but only point that breach occurs after the expiration of reasonable time for performance.

[15] In Damansara Realty Bhd, the facts were as follows. A property development agreement ('PDA') was entered between the plaintiff and the defendants where the plaintiff acquired the development rights over the land of the first defendant for 15 years, commencing 4 July 1994. Due to the plaintiff's failure to commence development, the defendants issued a termination notice dated 25 October 2007 to the plaintiff, that is, some 13 1/2 years into the PDA. The defendants claimed that the plaintiff's failure to develop the land was a material breach and/or a repudiation of the PDA. The dispute was whether the plaintiff was required to continuously develop the property over the span of 15 years or whether the plaintiff was at liberty to pick the time to commence development, so long as it commenced work within the 15 years period. Upon service of the termination notice, the plaintiff took some steps, ultimately unrealised, towards the development of the land. The plaintiff commenced action against the defendants for wrongful repudiation. In dismissing the action, the High Court held that it was reasonable to assume that the parties intended to have the whole property developed within the 15 years. The majority of the Court of Appeal agreed with the High Court. Leave was given to the plaintiff to appeal to the Federal Court on four questions. The second question was 'whether by reason of the limitation under s 56(2) of the Contracts Act 1950, a contracting party could terminate a contract during the life of the contract for alleged delay where time is not made of the essence?' The third question was 'whether by reason of s 47 of the (Contracts) Act, the common law rule that performance under a contract must be undertaken within a reasonable time is ousted where the parties have themselves specified time for performance?' In dismissing the appeal, the Federal Court per Richard Malanjum CJ (Sabah and Sarawak) delivering the judgment of the court, held that the second question wrongly implied that in order for time to be of essence it must be stipulated in a given contract:

> Question two implies that it is a principle of law that in order for time to be of the essence it must be stipulated in a given contract. With respect, such an impression, whether intended or otherwise, is erroneous. On the contrary, it is trite law that a contract need not contain such a term or clause for time to be made of the essence in the same way 'that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract' (see *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269). Thus, whether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties. There is no necessity in law that a clause making time of the

essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is to be of the essence does not ipso facto result in time being of the essence.

In the case of *Mohammed Ibrahim & Anor v Mohammed Abdul Razzak* AIR 2007 AP 294 the High Court of India observed that 'it is settled law, merely because there is a mention in the agreement making time as essence of the contract, it does not mean that such time is made an essence of the contract. The court has to decide the same while taking in to consideration the intention of parties in making such a stipulation, their conduct and surrounding circumstances'.

It follows that the absence of such a clause does not per se mean that the parties did not intend for time to be of the essence. In *Ranieri v Miles & Anor* [1980] 2 All ER 145 Lord Edmund-Davies in his speech rejected an assertion that in the absence of a clause stating that time was of the essence, the law regards the contract as unbroken provided that defaulting party performs its obligation within a reasonable time from the due date.

We are of course conscious that in any given contract where time is not of the essence, whether express or implied, then s 56(2) is relevant. In such case the innocent party is not entitled to terminate the contract and is only entitled to damages. It is under s 56(1) where time is of the essence that the innocent party may exercise its right to terminate the contract.

The distinction between the two sub-sections of s 56 has been succinctly explained by Cheong May Fong in *Civil Remedies in Malaysia*, Sweet & Maxwell Asia, 2007, at p 38 where the learned author said the following:

> 'In both s 56(1) and 56(2), a specified date is fixed for performance. However, under s 56(1), there is an intention that time should be of the essence of the contract but there is no similar intention under s 56(2). Thus, the effect of a breach to perform at the time stipulated under s 56(1) where time is of the essence cause the contract to be voidable and gives the innocent party the option whether to terminate (rescind) or carry on (affirm) the contract. On the other hand, a breach to perform within the time stipulated under s 56(2) where time is not of the essence, the contract is not voidable and the innocent party is only entitled to compensation for the loss suffered as a result of the breach.'

Reverting to this present case, it is not in doubt that the PDA does not expressly state that time is of the essence. However, we note that the learned High Court judge and the majority of the Court of Appeal concluded that it was implicit in the PDA that time was of the essence. We agree with their finding. As such s 56(2) becomes irrelevant. It follows that question two need not be answered.

… And incidentally, it is trite that there is a prima facie acceptance that in commercial contracts, time would be of the essence (see *Bunge Corpn v Tradax SA* [1981] 2 All ER 513; *Himatsing & Co v Joitaram* [1970] 2 MLJ 246). That rule, in our view, applies with even greater force in construction contracts. It can of course be rebutted if the parties indicate otherwise by words or conduct, but for a starting point, it must be assumed that the parties intended for time to be of the essence. It would not make much commercial sense if otherwise.

A

> Accordingly, it is our considered view that under the PDA, time was of the essence for the development to be commenced and completed within the 15 year period, even though it does not set out in detail the stages in which the development is to be progressed upon. By its failure to commence any development activity over the development property, the plaintiff is guilty of a breach of the PDA. Section 56(1) applies and the defendants were entitled to terminate the PDA.

B

[16] In relation to the third question, the Federal Court held that in commercial contracts, time is of the essence, that even if time were at large, there was still a duty on the plaintiff to commence work within a reasonable time, and as the plaintiff had failed to commence any development activity, the plaintiff was in breach of the PDA which justified termination:

C

> In view of our conclusion for question two we need not have to address this question three. However for completeness we say that it is a common law principle that even where parties to a contract do not intend time of the essence the promisor is still obliged to perform his obligation within a reasonable time. And it has been embodied in s 47 which reads:
>
> …

D

> However, in this case learned counsel for the plaintiff contended that since in this case there is already a time specified in the PDA, s 47 has no application. In other words the common law of reasonable performance within a reasonable time does not apply.

E

> In response learned counsel for the defendants submitted that even if time was not of the essence in the PDA, s 47 should apply. He went on to argued that 'the law of contracts in the common law world (unless the parties expressly agree otherwise) does not permit time to be at large, open-ended or indeterminate. Rather, the law is either that parties, expressly or impliedly, regard time as of the essence in which event s 56(1) would apply, or do not intend that time to be of the essence in which event s 47 would apply'.

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G

> …
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> … it is our considered view that even if time was at large, there was still a duty on the plaintiff to commence work within a reasonable time. By failing to take the necessary steps to commence development for thirteen and a half years, the plaintiff has indeed breached the PDA which justified the issuance of the termination notice.

H

[17] There was no notice fixing time for performance in Damansara Realty Bhd. Yet it was held by the Federal Court that there was a breach of the PDA when the plaintiff failed to commence development within a reasonable time. In other words, under s 47, a prior notice fixing time for performance is not a precursor to breach.

I

[18] It would not seem to the learned authors of the authoritative text at hand on s 46 of the Indian Contract Act (which is identical to s 47 of the Act)

that a prior notice is imperative to breach. Justice A Rahman, in *MLJ's Law of Contract and Specific Relief* (2nd Ed), 2009 Vol 1 at p 1007, noted 'the law engrafts on the contract a condition that reasonable time, in the absence of any specific time provided in the contract, will be of essence of the contract, and if the contract is not performed within that reasonable time, by any of the parties, that party will be guilty of breach of duty or breach of contract: 60 Punj LR 97; AIR 1958 Punj 111'. Pollock & Mulla on the *Indian Contracts and Specific Reliefs Acts* (10th Ed) at p 426 remarked 'It is not necessary in such cases (where no time is fixed by contract) to give notice before treating the contract as rescinded'. And Pollock & Mulla on the *Indian Contracts and Specific Reliefs Acts* (13th Ed) at p 1063 maintained 'Where no time is fixed by contract and the performance of the contract is to be effected within a reasonable time, it is not necessary in such cases to give notice before treating the contract as rescinded'. Rescission follows breach. Hence, it could be construed that Pollock & Mulla was of the view that a notice is not a precursor to breach.

[19] English Law on the subject of a contract in which time is not of the essence, as summarised by *Halsbury's Laws of England* (4th Ed), Reissue Vol 9(1) at para 935, is as follows:

> In cases where time is not originally of the essence of the contract, or where a stipulation making time of the essence has been waived, time may be made of the essence, where there is unreasonable delay, by a notice from the party who is not in default fixing a reasonable time for performance and stating that, in the event of non-performance within the time so fixed, he intends to treat the contract as broken. The time so fixed must be reasonable having regard to the state of things at the time when the notice is given, and to all the circumstances of the case. Indeed, where a completion date is specified in the contract, the innocent party need not await the expiry of the unreasonable delay, but may give notice immediately the breach occurred. Such a notice (at least where the completion of the contract can only be given effect by both parties discharging their outstanding obligations) is as binding on the party giving it as on the party receiving it. However, if a further extension of time is given, time remains of the essence.
>
> …
>
> *Even if the party not in default gives no notice, he may still be entitled to rescind if he proves that the other party would anyway not have been able to perform within a reasonable time:Etablissements Chainbaux SARL v Harbormaster* [1955] 1 Lloyd's Rep 303. *This may even be true even where the contract contains an express provision for the service of notice:Woods v Mackenzie Hill Ltd* [1975] 1 WLR 613. (Emphasis added.)

[20] Note 14 to the above para 935 appended that 'Similarly, where a party in default makes it clear by his conduct that he does not intend to proceed, such a notice is unnecessary: *Re Stone and Saville's Contract* [1963] 1 All ER 353 at pp

356, 357 ; [1963] 1 WLR 163 at p 171, CA per Upjohn LJ; and see also *Osborne v Australian Mutual Growth Fund* [1972] 1 NSWLR 100.

[21] *Chitty on Contracts* (13th Ed), Vol 1 at para 21–014 also clearly said that breach is antecedent to notice, meaning therefore that notice has no bearing on breach.

> Where time was not originally of the essence of the contract, but one party has been guilty of unreasonable delay, the other party may give notice requiring the contract to be performed within a reasonable time. Notice can be served at the moment of breach. It is not necessary to wait until there has been an unreasonable delay by the party in breach before serving the notice …

[22] The (13th Ed), of Treitel's 'The Law of Contract' by Edwin Peel, published in 2011, at para 18–097, was also unequivocal that with unreasonable delay, there is breach.

> Where time is not of the essence under the contract, but there has been a delay and, therefore, a breach, the injured party may serve a notice on the guilty party requiring him to comply. The notice may be served as soon as the other party is in default …

[23] *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308, *Hind Construction Contractors v State of Maharashtra* AIR 1979 SC 720 and *Ganam Rajamany v Somoo Siniah* [1984] 1 CD 123 were cited by learned counsel for the appellant to support the contention that under s 47, a notice fixing time is a prerequisite for breach.

[24] In *Tan Hock Chan*, the Federal Court per Chang Min Tat FCJ, delivering the judgment of the court, enunciated:

> Where a party is in breach of his covenant, particularly a covenant so essential to the performance of the contract as the one in this case for giving possession of the site, the other party to the contract may rescind the contract and he does so, ordinarily, by giving notice of his intention to do so. His right to do so arises immediately where time is or is made the essence and the time has passed.
>
> In the judgment of the High Court of Australia delivered by Fullagar J in *Carr v JA Berriman Pty Ltd* (1953–1954) 89 CLR 327 at pp 348–349 there occurs this passage:
>
> > Where a contract contains a promise to do a particular thing on or before a specified day, time may or may not be of the essence of the promise. If time is of the essence, and the promise is not performed on the day, the promisee is entitled to rescind the contract, but he may elect not to exercise this right, and an election will be inferred from any conduct which is consistent only with the continued existence of the contract. If time is not of the essence of the promise, the promisee

is not entitled to rescind for non-performance on the day. If either (a) time is not originally of the essence, or (b) time being originally of the essence, the right to rescind for non-performance on the day is lost by election, the promisee can, generally speaking, only rescind after he has given a notice requiring performance within a specified reasonable time and after non-compliance with that notice; see eg, *Taylor v Brown* 48 ER 1149; *Stickney v Keeble* [1915] AC 384; *Panoutsos v Raymond Hadley Corporation of New York* [1917] 2 KB 473.

[25] In *Tan Hock Chan*, the Federal Court enunciated on the notice requiring performance within a reasonable period as the first step before recession for non performance. In *Ganam Rajamany*, the Federal Court again expounded that the party not in default could make time of the essence of the contract by giving notice to the party in default to complete the contract within a reasonable time. And in *Hind Construction Contractors*, where the contract provided for construction within a stipulated period but also provided for extension of time and the levy of penalty/compensation for unfinished work after the expiry of the fixed date, the Indian Supreme Court held that those provisions excluded the inference that time was intended to be of essence of the contract and that the recession of the contract by the state government without fixing any further period making time of the essence and directing the contractor to complete the work within such period was illegal and wrongful.

[26] But with respect, we do not see how those three authorities could influence the outcome here, for what were said in *Tan Hock Chan*s', *Ganam Rajamany*s', and *Hind Construction Contractor*ss' on the notice fixing time for performance were said in the context of the rescission of a contract and not breach. Here, we are concerned not with any issue of rescission of the oral agreement but with the question of whether there could be breach by the respondent before the issuance of the appellant's notices fixing time for performance. As we see it, a notice fixing time for performance may be necessary, it all depends on the peculiar facts, to make time of the essence to justify rescission of the contract (see s 56(1) of the Act) to preclude the intervention of equity or, in other words, the effect of s 56(2) of the Act. The practical necessity for such a rule is that 'the notice operates as evidence of the date by which the promisee considers it reasonable to require the contract to be performed, failure to perform by which is evidence of an intention not to perform: see Lord Simon of Glaisdale in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, 946E–947A ; *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725, TCC, paras 147' (*Dalkia Utilities Services plc v Celtech International Ltd* [2006] All ER (D) 203 (Jan) para 131 per Christopher Clarke J). 'Before the Judicature Acts, equity's insistence that time was prima facie not essential to a contract for the sale of land was expressed either by granting specific performance to a party who was out of time or by restraining the other party from enforcing his consequential rights at law. Since

A the fusion of law and equity the view of equity has continued to prevail, but the authorities show that its patience is exhaustible. One example, a rare one, is where a party has delayed so long as to evince an intention not to be bound by the contract. In such a case the other party can without more treat the contract as repudiated: see *Farrant v Olver* (1922) WN 47. More commonly, equity will
B not allow the contract to be so treated unless the party in default has been given an opportunity to mend his ways. The only way in which that can be done is by giving him notice to comply within a reasonable time. Such a notice is invariably described as one making time of the essence of the contract, although it has been justly observed that the description is not quite accurate.
C That is because one party cannot vary the terms of the contract on his own. In reality the notice is given in order to bring to an end, by equitable means, equity's interference with the legal rights of the parties' (*Behzadi v Shaftesbury Hotels* [1992] Ch 1 per Nourse LJ).

D

[27] But such notice is not necessary to crystallise the antecedent breach of the party in default. Section 47 of the Act provides that 'Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be
E performed within a reasonable time'. The promise is discharged if the engagement is performed within a time which is reasonable under the existing circumstances (*Hick v Raymond and Reid* [1893] AC 22). If the promise is not performed within a reasonable time, then there is default. It is as straightforward as that.

F

[28] 'A notice fixing time for performance will not expunge or cancel breach already committed' (*Keating on Construction Contracts* (9th Ed), at p 275). In the leading case of *Raineri v Miles* [1981] AC 1050, the facts were as follows. By contract, the third parties agreed to sell a house to the defendants. Completion
G of the purchase with vacant possession was agreed to be on or before 12 July 1977. At the same time, the defendants agreed to sell the house in which they were living to the plaintiff. Completion of that purchase with vacant possession was also agreed to be on 12 July 1977. In neither case was the time for completion expressed to be of the essence of the contract. On 11 July 1997, the
H defendants were told that the third parties could not complete their contract on the following day. The defendants immediately informed the plaintiff's solicitors, but the plaintiff had already vacated his house and was on the road with his furniture and on his way to take possession of his new house. In consequence of the third parties' failure to complete their contract with the
I defendants on 12 July 1977, the defendants could not give vacant possession and complete their contract with the plaintiff. On 13 July 1997, the defendants gave notice to the third parties to complete the contract by 11 August 1997. The contract between the defendants and the third parties was duly completed on that day. The defendants' contract with the plaintiff was also completed on

that day and the plaintiff was let into possession. Between 12 July 1997 and 11 August 1997, the plaintiff incurred expense in providing himself and his family with living accommodation for which he recovered damages from the defendants. The defendants served the third parties with a third party notice claiming indemnity against the plaintiff's claim on the ground of the third parties' failure to give vacant possession on or before 12 July 1977. The judge dismissed the third party proceedings. On appeal by the defendants, the third parties contended that where time was not of the essence as the contract only required completion on the date fixed for completion or within a reasonable time thereafter and that, since they had completed in a reasonable time, they had not committed a breach of the contract and so were not liable in damages for the delay. They further contended that the effect of the notice to complete was to substitute for 12 July 1977 a new date for completion and that they had fulfilled the contracts as so varied. The Court of Appeal ([1979] 3 All ER 763) rejected these contentions and allowed the defendants' appeal. On appeal by the third parties to the House of Lords, Lord Fraser of Tullybelton said:

> So the right to give notice under that condition only arose after the date fixed for completion had passed without completion taking place, that is to say, in the circumstances of this case and if my view of the law is correct, after the appellants were already in breach of the contract. The effect of the notice was simply to make the further period of 28 days fixed by the notice of the essence of the contract, but it did not expunge or cancel the breach which the appellants had already committed.

[29] We would add that the absence of a notice fixing time for performance would not erase breach already committed, for as said, notice comes after default. With default, cause of action accrues and time starts to run.

[30] In the instant case, the respondent promised by contract to settle the interest of the proprietors of Lot 3660, the performance of which depended entirely on him alone, and the contract was silent as to the time for performance. The law provided that the respondent must perform that promise within a reasonable time. As said, the question for consideration posits the expiry of a reasonable time for performance. Strictly speaking, there is no need to consider the reasonable time for performance in the instant case. But perhaps for future guidance, we could throw some light on the reasonable time for the respondent to settle the interests of the proprietors of Lot 3660, having regard to the state of things and to all the circumstances of the case, and 'having regard to the nature and circumstances of the performance' (*Leake on Contracts* at p 836).

[31] On reasonable time for performance, in *Ellis v Thompson and Kebbel* (1838) 3 M&W 445 Alderson, B, said that:

A The correct mode of ascertaining what reasonable time is in such a case is by placing the court and Jury in the same situation as the contracting parties themselves were in at the time they made the contract; that is to say, by placing before the jury all those circumstances which were known to both parties at the time the contract was made and under which the contract took place. By so doing you enable the court and Jury
B to form a safer conclusion as to what is the reasonable time which the law implies and within which the contract is to be performed.

Leake on Contracts, p 200:

Under a written contract for the sale of goods appointing the time for payment, but
C silent as to the time for delivery; and, therefore, presumptively importing delivery within a reasonable time upon credit, evidence was held admissible of a usage in the trade, that the delivery should be made concurrently with the payment and could not be demanded before, *Field v Lelean*, 6 H&N 617, distinguishing or over-ruling *Spartali v Benecke*, 10 CB 212.

D

[32] By agreement dated 16 February 1993, the respondent agreed to settle the interest of the proprietors of the said lands. On 12 April 1993, the respondent reached settlement with the proprietors of Lots 2100 and 2043. Now given that the respondent could settle the interest of the proprietors of
E Lots 2100 and 2043 within two months from the date of his promise, should it not appear that a reasonable time for performance should therefore be measured in months and not years? Should it also not appear that the withdrawal of caveats was a performance that called for nothing less than expedition? So, when the promise was not performed for years, should it not
F strike the appellant that either the respondent could not perform or had repudiated his promise? Reasonably, when it reached years and it was still not performed, it should be conveyed to the appellant that the respondent, by his conduct, was in default.

G **[33]** In *Laurinda Pty Limited & Ors v Capalara Park Shopping Ptv Limited* (1989) 166 CLR 623, where (i) the lease between Laurinda and Capalara remained in unregistrable form, and over a period of nine months since let into possession Laurinda made written requests for the formalities of the lease to be complied with, (ii) the formal demand of Laurinda for a copy of the executed
H lease was met with a totally unresponsive reply, (iii) Laurinda purported to rescind, (iv) Capalara treated Laurinda's rescission as a wrongful repudiation of the agreement, and, (v) Laurinda's principal submission was that Capalara's conduct amounted to a repudiation of the agreement entitling Laurinda to treat the agreement as at an end, the High Court of Australia 'applied *Carr v JA*
I *Berriman Pty Ltd* (1953) 89 CLR 327; *Shevill v Builders Licensing Board* (1982) 149 CLR 620; 42 ALR 305; *Forslind v Bechely-Crundall* [1922] SC 173(HL)' and held 'that Capalara's conduct in all the circumstances showed an intention only to perform the contract in a manner substantially inconsistent with its obligations and thus amounted to a repudiation of the agreement entitling the

appellant to treat the agreement as at an end'. Of greater pertinence was the exposition in Laurinda on conduct that amounts to repudiation of the agreement.

[34] Mason CJ, in his written judgment at p 190 of the report, said:

> There is a difference between evincing an intention to carry out a contract only if and when it suits the party to do so and evincing an intention to carry out a contract as and when it suits the party to do so. In the first case the party intends not to carry out the contract at all in the event that it does not suit him. In the second case the party intends to carry out the contract, but only to carry it out as and when it suits him. It is much easier to say of the first than of the second case that the party has evinced an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way. But the outcome in the second case will depend upon its particular circumstances, including the terms of the contract. In some situations the intention to carry out the contract as and when it suits the party may be taken to such lengths that it amounts to an intention to fulfil the contract only in a manner substantially inconsistent with the party's obligations and not in any other way.

[35] Brennan J, in his written judgment at pp 199–200 of the report, said as follows:

> Repudiation is not ascertained by an inquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way. In *Freeth v Burr* (1874) LR 9 CP 208 at 213, Lord Coleridge CJ spoke of acts or conduct which 'do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract' or of acts and conduct which 'evince an intention no longer to be bound by the contract'. This was followed by the Earl of Selborne LC in *Mersey Steel and Iron Co (Ltd) v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 438–9:
>
> > I am content to take the rule as stated by Lord Coleridge in *Freeth v Burr*, which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.
>
> And in *Carswell v Collard* (1893) 20 R (HL) 47 at 48, Lord Herschell LC stated the question precisely: 'Of course, the question was not what actually influenced the defender, but what effect the conduct of the pursuer would be reasonably calculated to have upon a reasonable person.

Forslind v Bechely-Crundall [1922] SC (HL) 173 is in accord with this view, though Lord Shaw of Dunfermline may be thought to go beyond Lord Herschell's test (at 191–2) in emphasising the effect of the defaulting party's conduct on the mind of the innocent party.

The question whether an inference of repudiation should be drawn merely from continued failure to perform requires an evaluation of the delay from the standpoint of the innocent party. Would a reasonable person in the shoes of the innocent party clearly infer that the other party would not be bound by the contract or would fulfil it only in a manner substantially inconsistent with that party's obligations and in no other way?

[36] Deane and Dawson JJ, in their written judgment at 207 of the report further expounded:

The question which must now be answered is whether the lessor's conduct up to and including the letter of 3 September 1986 was such as to constitute repudiation of the contract.

Lord Wright's oft-quoted admonition that 'repudiation of a contract is a serious matter, not to be lightly found or inferred' *Ross T Smyth & Co Ltd v TD Bailey, Son & Co* [1940] 3 All ER 60 at 71 is, no doubt, a wise one. It should not, however, be allowed to cloud the fact that an allegation of repudiation of contract in a civil case does not involve an assertion that the alleged repudiator subjectively intended to repudiate his obligations. Thus, it is of little assistance in the present case to identify reasons the lessor was unlikely to have subjectively desired to repudiate its agreement to grant a lease. An issue of repudiation turns upon objective acts and omissions and not upon uncommunicated intention. The question is what effect the lessor's conduct 'would be reasonably calculated to have upon a reasonable person' (per Lord Herschell LC, *Carswell v Collard* (1893) 20 R(HL) 47 at 48; *Forslind v Bechely-Crundall* [1922] SC(HL) 173 at 190). It suffices that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.

… The totally unresponsive reply of 3 September 1986 seems to us to have taken the matter to a stage where the combined effect of dishonoured assurances, continued failure to produce a lease in registrable form and continued refusal properly to address the lessee's legitimate requirements and complaints was, to adapt words used by Fullagar J in *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 at 351, such that a reasonable man could hardly draw any other inference than that the lessor was not prepared to take its primary obligation under the contract seriously.

It is not necessary for repudiation of a contract that the repudiator make plain that he will never perform his contractual obligations at all. What Lord Dunedin described (*Forslind*, at 190) as the assumption of 'a shilly-shallying attitude in regard to the contract' and what Lord Shaw of Dunfermline (*ibid*, at 192) called 'procrastination persistently practised' can, in some circumstances, reach the stage of repudiation even though accompanied by assurances of ultimate performance at

some future time. In that regard, the law was correctly stated by Lord Shaw in the following extract from his judgment in *Forslind* (at 191–2) which is directly in point to the circumstances of the present case:

> If, in short, A, a party to a contract, acts in such a fashion of ignoring or not complying with his obligations under it, B, the other party, is entitled to say: 'My rights under this contract are being completely ignored and my interests may suffer by non-performance by A of his obligations, and that to such a fundamental and essential extent that I declare he is treating me as if no contract existed which bound him.'… In business over and over again it occurs — as, in my opinion, it occurred in the present case — that procrastination is so persistently practised as to make a most serious inroad into the rights of the other party to a contract. There must be a stage when the person suffering from that is entitled to say: This must be brought to an end. My efforts have been unavailing, and I declare that you have broken your contract relations with me.

Lord Shaw went on to point out (at p 192) that 'the question whether the stage has been reached when procrastination or non-performance' constitutes repudiation is essentially one of fact. That question will, as has been said, only be properly answered in the affirmative when procrastination or non-performance has marked the stage of conveying to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it. It was, in our view, correctly resolved by the learned trial judge in the lessee's favour in the present case when he held that the lessor's conduct constituted repudiation of the contract which entitled the lessee to terminate it.

[37] The High Court below held that a reasonable time for performance ended on 31 December 1994, that is more than 1 and a 1/2 years after the respondent had settled the interest of the proprietors of Lots 2100 and 2043 on 12 April 1993. In our view, having regard to the state of things, and to the circumstances of the case and nature and circumstances of the performance, even well before the end of 1993, it should be conveyed to any reasonable person in the shoes of the appellant that either the respondent could not perform the promise, which was default, or had taken such lengths to perform the promise as to amount to repudiation or disavowal either of the oral agreement in relation to Lot 3660 as a whole or of a fundamental obligation under it. We accordingly agree with the finding of the High Court and as affirmed by the Court of Appeal that a reasonable time for performance ended at the end of 1994 and that the action, which was filed in 2002, was therefore filed out of time.

[38] The final observation we wish to impart is that 'Notice is not necessary if a party delay performance for so long and in such circumstances, as to amount to repudiation of the contract. The only legitimate inference may be that he or she is saying 'Not only have I broken my contract by not doing the thing on the due day, but I am not going to do the thing at all' or I am not going

A to do the thing at all unless and until I find it convenient to do it' (*Cheshire & Fifoot's Law of Contract* (6th Australian Ed), at p 742).

[39] For the reasons given herein, we unanimously answer the question in the affirmative and dismiss this appeal with costs.

B

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor

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